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Supreme Court of the United States

OCTOBER TERM, 1939

No. 161

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

RALPH M. WEST, AND THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION.

No. 162

MARTIN ENGEBRETSON, TRUSTEE OF THE ESTATE OF THE BRICTSON MANUFACTURING COMPANY, A CORPORATION, BANKRUPT, *Petitioner,*

vs.

JOHN T. MARCELL, HARRY S. BYRNE, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Martin Engebretson, Trustee of the Estate of The Brictson Manufacturing Company, a corpora-

tion, bankrupt, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit, entered in the above causes on May 6, 1940, confirming judgments of the District Court of the United States for the District of South Dakota, Southern Division, dated April 17, 1939.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in .... F. (2) ...., and is found at page 211 of the record herein.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938, Sec. 1 (February 13, 1935). 28 U. S. C. A., Sec. 347.

SUMMARY STATEMENT OF MATTERS INVOLVED

The above causes were consolidated for trial by the District Court with separate findings of fact, conclusions of law and judgment. The judgment in each instance was against the trustee in bankruptcy, the petitioner here. Separate appeals were perfected with the record on appeal in the first case containing the evidence received on the trial of the consolidated actions. The cases were argued together in the Circuit Court of Appeals with one opinion by that court. We will designate the record in the first case as "R" and the record in the second case as "R_2."

The District Court of the United States, District Court of Nebraska, Omaha Division, hereinafter called Federal Court, appointed Ralph M. West of Omaha, Nebraska, hereinafter called West, receiver of all of the property of The Brictson

Manufacturing Company, a South Dakota corporation, hereinafter called corporation, on September 3, 1921, in an action wherein H. E. Close, *et al.*, were complainants, and The Brictson Manufacturing Company, was defendant, hereinafter called Close case (R. 24). West gave bond as receiver (R. 26, finding V, 61) and took possession of all of the corporate property (R. 62, finding VI). On appeal the order appointing West receiver was reversed upon the ground that there was no basis in pleading or fact for the appointment of a receiver and the District Court was ordered to require the receiver to return the property in his hands "to those from whom he received it" and that he be thereupon discharged (R. 123, 124; 280 F. 297). Before the property was returned the corporation was ousted as a foreign corporation from Nebraska in a *quo warranto* action in the State Court of Douglas County, Nebraska, hereinafter called State Court, in an action wherein State of Nebraska, *ex rel.* Ora S. Spillman, attorney general, was plaintiff, and The Brictson Manufacturing Company was defendant, hereinafter called *quo warranto* action, and John T. Marcell and others, hereinafter called Nebraska trustees, were appointed trustees for the corporation on February 16, 1924 (R. 154, 157). On appeal the judgment of ouster and appointment of the Nebraska trustees "to collect the debts due the corporation, pay the liabilities of the corporation and when properly ordered to pay the surplus, if any, to those entitled thereto as provided by Section 9298, Compiled Statutes of Nebraska for 1922" was affirmed (R. 159, 160). The *quo warranto* law of Nebraska will be found in the Appendix to this petition. On June 24, 1929, in the Close case, the Federal Court directed West to deliver the property of the corporation to the Nebraska trustees (R. 40, 42), but before he did so the corporation, on August 21, 1929, on a petition filed August

3, 1929, in the Federal Court of South Dakota, was adjudicated a bankrupt and petitioner is the trustee of the bankrupt estate (R. 61, finding III). West delivered the property to the Nebraska trustees September 7, 1929 (R. 62, 63, finding VII), who at all times since have exercised dominion and control over the same (R_2. 60, finding IX). On May 14, 1930, this petitioner as the trustee in bankruptcy advised the State Court that the corporation had been adjudicated a bankrupt and that he was trustee and petitioned that court to have the Nebraska trustees deliver to him the assets of the bankrupt estate which they held, but the court denied the relief (R. 170-173, R_2. 43, 44). Next, this petitioner as the trustee in bankruptcy, obtained an order from the bankruptcy court in a summary proceeding adjudging he had the title to the property of the bankrupt estate then held by the Nebraska trustees and that he was entitled to the possession thereof. On appeal this order was reversed and the bankruptcy court in *Marcell, et al., vs. Engebretson* (8 C. C. A.), 74 F. (2) 93, hereinafter called summary proceeding, was directed to dismiss the summary proceeding for want of jurisdiction. Next, this petitioner as the trustee in bankruptcy, commenced a plenary action in the Federal Court of Nebraska against the Nebraska trustees claiming he had title to the assets that West delivered to them and was entitled to the possession of the same. That action was dismissed on the ground that the court was without jurisdiction of the subject matter. On appeal in *Engebretson vs. Marcell, et al.* (8 C. C. A.), 84 F. (2) 315, hereinafter called plenary action, the dismissal was affirmed. The Federal Court in the Close case with actual notice that the corporation had been adjudicated a bankrupt and that no trustee had yet been appointed, made an order on November 27, 1929, purporting to release and discharge West

and exonerate his bond. The order will be found in the record at page 45 and the notice at page 115. The causes at bar result from a suit brought against West and the surety on his bond and a suit brought against the Nebraska trustees and the surety on their bond claiming that West breached his bond and the Nebraska trustees breached their bond when after supervening bankruptcy West delivered the assets of the bankrupt estate to and the Nebraska trustees took possession of the same and exercised dominion and control over the same. The cases at bar do not disturb the possession of the State Court. A suit to obtain possession of the bankrupt assets that West delivered to the Nebraska trustees would be unavailing as the District Court found most of such property has been dissipated (R_2. 62, finding XIV). The District Court in each instance rendered judgments against this petitioner as trustee in bankruptcy.

QUESTIONS PRESENTED

1.

Whether the judgment of the Circuit Court of Appeals, or its reasons therefor, or its *dictum* in connection therewith, reversing and ordering the bankruptcy court to dismiss *Marcell, et al., vs. Engebretson*, 74 F. (2) 93, for lack of summary jurisdiction; or the judgment of the Circuit Court of Appeals, or its reason therefor, or its *dictum* in connection therewith; affirming the judgment of the District Court dismissing *Engebretson vs. Marcell, et al.*, 84 F. (2) 315, for want of jurisdiction of the subject matter, determine any issue of merits in either case or that anything done in either case constituted *res judicata* of the issue whether West breached his bond as receiver; and whether the Nebraska trustees breached their bond as trustees when after supervening

bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same.

2.

Whether the judgment of the State Court in the *quo warranto* action and its orders and the *quo warranto* law of Nebraska, so far as the same provided for collecting the debts due the corporation, paying the liabilities and when properly ordered to pay the surplus, if any, to those entitled thereto, were superseded by the National Bankruptcy Act and the jurisdiction of the bankruptcy court.

3.

Whether with supervening bankruptcy whatever jurisdiction the Nebraska Federal Court had over the assets that West had received from the corporation and that were then in the actual possession of West came to an end, and such assets passed to the custody of the law in the bankruptcy court with West the mere repository for same subject to the jurisdiction of the bankruptcy court. Whether after supervening bankruptcy West could justify his delivering the assets of the bankrupt estate to the Nebraska trustees upon the ground that in doing so he obeyed the order of the court that appointed him.

4.

Whether the order of the State Court in the *quo warranto* action refusing to direct the Nebraska trustees to deliver the assets of the bankrupt estate to the trustee in bankruptcy constituted *res judicata* of the issue whether West breached his bond as receiver and whether the Nebraska

trustees breached their bond as trustee when after supervening bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same.

5.

Whether the Circuit Court of Appeals has misapplied the rule of this court in *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 75 L. Ed. 645, 51 S. Ct. 270, 272, and *Palmer vs. Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 S. Ct. 230, as to conflict between Federal and State Courts exercising a concurrent jurisdiction by applying it to the bankruptcy court exercising an exclusive paramount jurisdiction.

6.

Whether the holding of the Circuit Court of Appeals that *Marcell, et al., vs. Engebretson*, 74 F. (2) 93 (dismissed for lack of summary jurisdiction), and *Engebretson vs. Marcell, et al.*, 84 F. (2) 315 (dismissed for want of jurisdiction over the subject matter), constituted *res judicata* of the issue whether West breached his bond as receiver; and whether the Nebraska trustees breached their bond as trustees when after supervening bankruptcy West delivered to and the Nebraska trustees took possession of the assets of the bankrupt estate and exercised dominion and control over the same, gave an unwarranted effect to its judgments in these cases and by so doing deprived the trustee in bankruptcy of his property without due process of law contrary to the fifth amendment to the United States Constitution.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court of the United States for the District of South Dakota, appealed from in favor of Ralph M. West and The Aetna Casualty & Surety Company, a corporation, and against Martin Engebretson, trustee.

2. In affirming the judgment of the District Court of the United States for the District of South Dakota, appealed from in favor of John T. Marcell, Harry S. Byrne and Fidelity and Deposit Company of Maryland, a corporation, and against Martin Engebretson, trustee.

3. In holding that the Federal Court discharged West as receiver and released and exonerated his bond on November 27, 1929.

4. In holding that the order of the State Court, dated May 17, 1930, denying the application of the trustee in bankruptcy for possession of the assets of the bankrupt estate held by the Nebraska trustees constituted *res judicata* in the cases at bar.

5. In holding that the issue determined in the summary proceeding and the plenary action was the right of the State Court trustee to possession of the assets of the bankrupt as against the trustee in bankruptcy and that the court of bankruptcy was without jurisdiction to deal with such assets because the same were in the exclusive jurisdiction of the State Court which court had jurisdiction over such property and that the Nebraska state trustees had the right to administer such property.

6. In holding that West was an officer of the Federal

Court and could not have breached his bond by obeying the order of the court appointing him.

7. In holding that the judgment or reasons of the court or its *dictum* in the summary proceeding and also in the plenary action constituted *res judicata* of the issues in each of the cases at bar.

8. In failing to give effect to the National Bankruptcy Act and the exclusive paramount jurisdiction of the bankruptcy court.

9. In taking the property of this petitioner, trustee in bankruptcy, without due process of law contrary to the Fifth Amendment to the United States Constitution, by giving unwarranted effect to its judgments in the summary proceeding and in the plenary action and denying to this petitioner his day in court.

10. In failing to hold that with supervening bankruptcy whatever jurisdiction the State Court had over the assets of the bankrupt came to an end.

11. In failing to hold that with supervening bankruptcy the jurisdiction of the Federal Court and its unexecuted order directing West to deliver the property of the corporation to the Nebraska trustees, came to an end and any unexecuted orders of the Federal Court or any orders it made thereafter were without force or effect, so far as the trustee in bankruptcy or the bankrupt estate was concerned, and that the bankrupt assets were held by West as the mere repository for the bankruptcy court and subject to its jurisdiction.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

REASON I

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority as well as in conflict with the decisions of this Court. The Circuit Court of Appeals, in its opinion in this connection, holds:

> "In our view, it will not be necessary to go beyond the decisions of this court in *Marcell vs. Engebretson*, 74 F. 2d 93, and *Engebretson vs. Marcell*, 84 F. 2d 315 * * *. The issue which was determined was the right of the State Court trustees to possession of the assets of the bankrupt as against the trustee in bankruptcy. In *Marcell vs. Engebretson*, 74 F. 2d 93, it was necessary that this court determine the status of the property at the time of the filing of the petition in bankruptcy, and it was held that the constructive possession of that property was in the State Court and for that reason the court of bankruptcy was without jurisdiction to deal with it, it being in the exclusive jurisdiction of the State Court * * *. The disposition of these issues disposes of the questions presented by Plaintiff, for if possession was rightfully in the State Court trustees and the State Court had acquired jurisdiction of the assets long before bankruptcy, then the receiver delivered the assets to the right person and the Plaintiff was not entitled to them * * *. This court held that the Nebraska State Court had jurisdiction over the property and that the Nebraska State trustees had the right to administer it. Such a decision was evidence that Plaintiff was without right to receive the assets at the time West delivered them to the trustees" (R. 216, 217).

It is not clear from the above language whether the Circuit Court of Appeals considers its previous opinions referred to as constituting *res judicata*, or whether it considers its rea-

sons or *dictum* set forth in these opinions as good law and is following the same for that reason. If the court relies upon its former opinions above mentioned, we submit they do not constitute *res judicata* because the judgment of the Circuit Court of Appeals in each case did not and the court in each case was without jurisdiction to determine title, right to possession or which court should administer the assets of the bankrupt estate that West delivered to the Nebraska trustees.

In the summary proceeding the Circuit Court of Appeals found that the bankruptcy court was without jurisdiction to adjudicate title and it directed the District Court to dismiss the summary proceedings for lack of jurisdiction, 74 Fed. (2) 93, 99. In the summary proceeding the jurisdiction of the bankruptcy court was limited to whether the bankrupt had possession when the petition in bankruptcy was filed and if possession was lacking whether an adverse claim was asserted. *Thompson vs. Magnolia Petroleum Co.*, ...U. S...., ...L. Ed...., 60 S. Ct. 628, 630, note 4. *In re Harrison vs. Chamberlin*, 271 U. S. 191, 194, 70 L. Ed. 897, 46 S. Ct. 467, 468. Since the summary jurisdiction was lacking the bankruptcy court could not pass on the merits. In *Harrison vs. Chamberlin, supra,* this court said that where the bankruptcy court lacked summary jurisdiction it must decline to determine the merits. To the same effect is *Gamble vs. Daniel* (8 C. C. A.), 39 Fed. (2) 447, 453.

So far as the plenary action was concerned the Federal Court dismissed it for lack of jurisdiction over the subject matter. The subject matter was the title and right to possession of the property West had delivered to and the Nebraska trustees as officers of the State Court claimed. It is well settled that where a court dismisses an action for want of jurisdiction no question of merit can be passed upon.

Hughes vs. U. S., 4 Wall. 232, 233, 18 L. Ed. 303, 305. *McGilvra vs. Ross*, 215 U. S. 70, 80, 54 L. Ed. 94, 101, 30 S. Ct. 27, 31. *Shawnee Sewerage & Drainage Company vs. Frank P. Stearns*, 220 U. S. 462, 472, 55 L. Ed. 544, 547, 31 S. Ct. 452, 456. *In re National Labor Relations Board*, 304 U. S. 486, 494, 82 L. Ed. 1482, 58 S. Ct. 1001, 1005. In *U. S. vs. Corrick*, 298 U. S. 435, 440, 80 L. Ed. 263, 56 S. Ct. 829, 832, this court said as to the jurisdiction on appeal: "While the district court lacked jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit."

If the reasons or *dictum* of the Circuit Court of Appeals, in its two former opinions, are relied upon, the same does not constitute *res judicata*. In *Deposit Bank of Frankfort vs. Board of Councilmen*, 191 U. S. 499, 510, 48 L. Ed. 276, 280, 24 S. Ct. 154, 158, this court held that a judgment not the court's reason is necessary to constitute *res judicata*. That *dictum* does not constitute *res judicata* is well established. *Cohens vs. Virginia*, 6 Wheaton 264, 399, 5 L. Ed. 257. If the court's *dictum* holds as claimed by the Circuit Court of Appeals, we submit that it is not good law and should not be followed. The law in that connection we will discuss in connection with Reason II. If on an appeal, on the question of summary jurisdiction, the appellate court may pass on the merits, an adverse claimant no longer is entitled to a plenary action because by appealing an adjudication can be had in the appellate court.

REASON II

The Circuit Court of Appeals has failed to give effect to the National Bankruptcy Act, the exclusive paramount jurisdiction of the bankruptcy court and the applicable decisions of this court so far as the effect of supervening bankruptcy may be concerned on the *quo warranto* law of Nebraska, the jurisdiction of the State Court, the Nebraska trustees as trustees and on the conditions on the bond of the Nebraska trustees to collect the debts due the corporation and pay the liabilities. The Circuit Court of Appeals holds that the bankruptcy court was without jurisdiction to deal with the assets of the bankrupt estate that West delivered to the Nebraska trustees, it being in the exclusive jurisdiction of the State Court and that the State Court had the right to administer such assets (R. 217). That is, that the State Court will collect the debts due the corporation, pay the liabilities, etc. That is, the corporation's property was taken by the Nebraska state law to be distributed by the Nebraska State Court to creditors. The duties of the Nebraska trustees made them liquidating or winding-up officers of the State Court.

The *quo warranto* law of Nebraska and the judgment and orders of the State Court in so far as the same provided for collecting the corporate debts, paying the liabilities and winding up the affairs of the corporation were superseded by the exclusive paramount jurisdiction of the bankruptcy court and the National Bankruptcy Act. *In re Klein,* Fed. Cas. 7865, 1 How. 277, 11 L. Ed. 132, holds that any state law that distributes the property of the debtor among creditors conflicts with the National Bankruptcy Act. This case is cited with approval in *Hanover National Bank vs. Moyses,* 186 U. S. 181, 46 L. Ed. 1113, 22 S. Ct. 857, and

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 588, 79 L. Ed. 1593, 55 S. Ct. 854, 862, note 18. Neither the legislature nor the courts of a state can take action which restricts the scope of the National Bankruptcy Act. *Kalb, et ux., vs. Feuerstein, et ux.*, 308 U. S. 433, 84 L. Ed. 280, 260 S. Ct. 343. *Hammond vs. Lyon Realty Co., et al.* (4 C. C. A.), 59 F. (2) 592, 594. *International Shoe Co. vs. Pinkus, et al.*, 278 U. S. 261, 267, 73 L. Ed. 318, 49 S. Ct. 108, 110. Our examination of this court's decisions has failed to disclose a single case in which a state law that took the debtor's property and distributed it to creditors has been sustained. This court has sustained state laws where the substantive right under an assignment for benefit of creditors depended upon contract and the legislation merely governed the execution of the trust on which the property was conveyed. *Pobresle vs. Boyd*, 287 U. S. 518, 526, 77 L. Ed. 469, 53 S. Ct. 262, 264. The distinction between a state law that divests a debtor of his property for the purpose of compulsory distribution among his creditors and a state law that merely implements the debtor's inherent capacity to divest himself of that property by the voluntary exercise of his natural power to contract concerning his own property was recognized at an early time. *Hitchcock vs. Sedgewick* (1690), 2 Vernon's Reports 155. This principle is discussed in *Cook vs. Rogers*, 31 Mich. 391, 398. In *Straton vs. New*, 283 U. S. 318, 330, 75 L. Ed. 1060, 51 S. Ct. 465, 470, note 13, this court cites cases where the functions of the court's officers were that of winding up which conflicted with the National Bankrupcty Act. In *First National Bank vs. Robinson, et al.* (10 C. C. A.), 107 F. (2) 50, 53, a New Mexico law providing for the dissolution of a domestic corporation unless reorganized was held to be superseded by the National Bankruptcy Act. The ousting of the corporation from its fran-

chise was no part of the liquidation. *Chicago T. & T. Co. vs. Forty-One Thirty-Six W. Bldg. Corp.*, 302 U. S. 120, 126, 82 L. Ed. 147, 58 S. Ct. 125, 128. While the Nebraska Supreme Court in its opinion in 207 N. W. 664, 665, construed the *quo warranto* law as authorizing the Nebraska trustees "to pay the liabilities thereof that may be due to citizens or residents of this state," its mandate (R. 160) contains no such limitation. If the statute is subject to this limitation it would be unconstitutional. *Blake vs. McClung*, 172 U. S. 239, 43 L. Ed. 432, 19 S. Ct. 165. A state law providing for the taking of part of the debtor's assets for the payment of a portion of his creditors would not prevent it from conflicting with the National Bankruptcy Law. *In re Salmon* (D. C.), 143 F. 395, cited in *Straton vs. New*, *supra*, note 13, involved the distribution of the assets of a private state bank among bank creditors and the state law was held to conflict with the National Bankruptcy Act. The lapse of time does not save the jurisdiction of a court acting under a law superseded by the National Bankruptcy Act. *In re Weedman Stave Co.* (D. C.), 199 F. 948, cited in *Straton vs. New*, *supra*, note 13, the receiver in the State Court was in actual possession for more than four months before bankruptcy. The same was true in *Cresson & Clearfield Coal & Coke Co. vs. Staffer* (3 C. C. A.), 148 F. 981, and in *In re American & British Mfg. Corporation* (1 C. C. A.), 300 F. 839. If the Nebraska trustees be considered equity receivers they would still have to yield to the trustee in bankruptcy. *Duparquet Hont & Monense Co. vs. Evans*, 297 U. S. 216, 222, 80 L. Ed. 413, 56 S. Ct. 412, 415.

We submit that at the time West delivered the property to the Nebraska trustees that property belonged to the trustee in bankruptcy, was in the custody of the law in the bankruptcy court with West the mere repository of the same sub-

ject to the jurisdiction of the bankruptcy court and that whatever jurisdiction, if any, the State Court ever had over such property that the same came to an end with supervening bankruptcy. *Gross vs. Irving Trust Company,* 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605. *Taylor vs. Sternberg,* 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260. *Kalb vs. Feuerstein, supra.* The bankruptcy law was impliedly read into the bond of the Nebraska trustees and after supervening bankruptcy the Nebraska trustees' bond became subject to the conditions of the National Bankruptcy Law. *Wright vs. Union Central Life Ins. Co.,* 304 U. S. 502, 516, 86 L. Ed. 1490, 58 S. Ct. 1025, 1033.

REASON III

The Circuit Court of Appeals failed to give effect to the National Bankruptcy Law, the exclusive paramount jurisdiction of the bankruptcy court and the applicable decisions of this court; so far as the effect may be concerned of supervening bankruptcy on the jurisdiction of the Federal Court, on West as receiver and on the condition of the bond of West as receiver. The Circuit Court of Appeals holds: that the trustee in bankruptcy could not receive the assets of the bankrupt estate from West at the time he delivered the assets to the Nebraska trustees (R. 217); that West was an officer of the United States District Court of Nebraska and the condition of his bond was that he should obey the orders of that court in relation to his trust and that he could not breach his bond by obeying the order of the court appointing him (R. 219); and, that the Federal Court after actual notice of the corporation having been adjudicated a bankrupt made an order releasing and discharging West as receiver and exonerating his bond (R. 214).

We submit that with supervening bankruptcy the jurisdiction of the Federal Court came to an end. *Taylor vs. Sternberg, supra; Kalb vs. Feuerstein, supra.* So far as West was concerned after supervening bankruptcy he was the mere repository of property, the title to which had passed to the trustee in bankruptcy, with the property in the custody of the law in the bankruptcy court and West subject to the jurisdiction of the bankruptcy court. *Taylor vs. Sternberg, supra.* The bankruptcy law was impliedly written into West's bond as receiver. *Wright vs. Union Central Life Ins. Co.,* 304 U. S. 502, 516, 86 L. Ed. 1490, 58 S. Ct. 1025, 1033. After supervening bankruptcy the condition of West's bond required him to obey not the orders of the Federal Court but the bankruptcy court. After supervening bankruptcy not only was the order of the Federal Court directing West to deliver the property of the corporation to the Nebraska trustees without further force or effect, but the title to that property had passed to the trustee in bankruptcy and the property that West delivered to, and the Nebraska trustees received, was no longer the property of the corporation but the property of the trustee in bankruptcy. After supervening bankruptcy it was beyond the jurisdiction of the Federal Court to release and discharge West or exonerate his bond. *Taylor vs. Sternberg, supra,* and cases cited therein.

REASON IV

The holding of the Circuit Court of Appeals, that the State Court's order denying the application of the trustee in bankruptcy for possession of the property of the estate of the bankrupt constituted *res judicata* of the issue whether West breached his bond as receiver by delivering the assets of the bankrupt estate to the bankruptcy trustees conflicts with the following cases among others: *In re Diamond's Estate* (6 C. C. A.), 259 F. 70, 73, 75; *In re Watts & Sachs*, 190 U. S. 1, 27, 47 L. Ed. 933, 941, 23 S. Ct. 718, 724; *Gross vs. Irving Trust Co.*, 289 U. S. 342, 345, 77 L. Ed. 1243, 53 S. Ct. 605, 606, 607, 90 A. L. R. 1215. These cases hold that with due regard for comity a trustee in bankruptcy should apply to the non-bankruptcy court having possession of the assets of the bankrupt estate, calling its attention to the supervening bankruptcy and asking for possession of such assets and that such court's refusal to surrender possession did not constitute *res judicata.*

REASON V

The Circuit Court of Appeals has misapplied this court's holdings in *Isaacs vs. Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738, 75 L. Ed. 645, 51 S. Ct. 270, 272, and in *Palmer vs. State of Texas*, 212 U. S. 118, 53 L. Ed. 435, 29 S. Ct. 230. In *Isaacs vs. Hobbs Tie & Timber Co., supra*, by virtue of the exclusive paramount jurisdiction of the bankruptcy court, the real estate in Arkansas, part of the bankrupt estate was brought into the possession of that court in Texas. The property being in the possession of the bankruptcy court it exercised its concurrent jurisdiction relative to the mortgage lien to the exclusion of other courts the same as a court of

concurrent jurisdiction would do. The Circuit Court of Appeals in applying the rule in the Isaacs case holds that the State Court exercising a jurisdiction to take possession of the corporate assets, "collect the debts due the corporation and pay the liabilities, etc." was an exclusive jurisdiction which prevented the bankruptcy court from exercising its exclusive paramount jurisdiction as to the property belonging to the estate of the bankrupt and in the actual possession of West at the time that bankruptcy supervened. In other words, the State Court taking the property of the corporation by virtue of the state law to distribute it to creditors is exercising an exclusive jurisdiction, and since it is claimed to have first obtained constructive possession, it is to exercise its jurisdiction without interference from the bankruptcy court. This holding conflicts with numerous decisions of the Circuit Courts of Appeal and the applicable decisions of this court. In *In re Watts & Sachs*, 190 U. S. 1, 27, 47 L. Ed. 933, 941, 23 S. Ct. 718, 724, this court said: "But that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent." In *Gross vs. Irving Trust Co.*, 289 U. S. 342, 344, 77 L. Ed. 1243, 53 S. Ct. 605, this court holds that the rule between courts of concurrent jurisdiction does not apply to a bankruptcy court exercising a paramount jurisdiction.

In *Palmer vs. Texas, supra*, both the State Court and the Federal Court were exercising a concurrent jurisdiction and since the State Court was held to have first obtained jurisdiction the Federal Court was required to relinquish its jurisdiction. No question of the exercise of the exclusive paramount jurisdiction of a bankruptcy court was involved in that case. We submit that neither of the above mentioned cases sustains the holding of the Circuit Court of Appeals.

REASON VI

The holding of the Circuit Court of Appeals that *Marcell, et al., vs. Engebretson,* 74 Fed. (2) 93, and *Engebretson vs. Marcell, et al.,* 84 Fed. (2) 315, constituted *res judicata* of the issue whether West breached his bond as receiver when he turned the assets that he had received from the corporation to the Nebraska trustees gave an unwarranted effect to its judgment in these cases and by so doing has deprived the trustee in bankruptcy of his property without due process of law contrary to the Fifth Amendment to the United States Constitution. *Fayerweather vs. Ritch,* 195 U. S. 276, 297, 298, 49 L. Ed. 193, 25 S. Ct. 58, 63, 64. The trustee in bankruptcy has been denied his day in court because in the summary proceeding and in the plenary action he was denied relief because in each instance the court was without jurisdiction. In the cases at bar he is again denied relief because it is now claimed that his rights were determined in the summary proceeding and in the plenary action.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted.

Respectfully submitted,

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